85-1445

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1985

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

Petitioners,

vs.

PACCAR, INC., a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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February 26, 1986

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QUESTIONS PRESENTED

I. Whether a dealer, in bringing a claim under the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225, must introduce direct evidence of discrimination to the exclusion of all other non-discriminatory explanations, and cannot rely on reasonable inferences derived from evidence of the course of dealings between the parties.

II. On appeal of an order granting (1) Judgment Notwithstanding the Verdict ("JNOV") against the petitioners pursuant to their Rule 60(b) motion, and alternatively (2) a new trial, whether the appellate court can refuse to review the JNOV, review only the grant of a new trial and upon affirming such, affirm the entry of JNOV so as to deny petitioners a trial by jury.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Eleventh Circuit. Peterbilt of Florida, Inc., a Florida corporation, has no parent companies, subsidiaries, or affiliates.

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OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at *Deas* v. *PACCAR, Inc.*, 775 F.2d 1498 (11th Cir.1985). The Court of Appeals' order denying rehearing is not printed in an official reporter at this date. The final judgment of the trial court was not printed in an official reporter.

STATEMENT OF JURISDICTION

This petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit arises from a decision by said court rendered November 14, 1985. The appellate court subsequently denied petitioners' timely petition for rehearing on December 26, 1985. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

This petition involves the federal Automobile Dealers Day in Court Act, 15 U.S.C.§§ 1221-1225 (1982). The portions of such act pertinent to the issues raised herein are set forth below:

"§ 1221.

As used in this chapter —

"(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

"§ 1222.

"An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

STATEMENT OF THE CASE

Peterbilt of Florida, Inc. ("POF"), the exclusive Florida dealer for heavy-duty Peterbilt trucks for 15 years, was terminated by the manufacturer ("PACCAR") in mid-1979, allegedly because it did not have a written commitment for wholesale floor plan financing (PX-190)[1]. POF brought suit under, *inter alia,* the Federal Dealers Act, claiming that the manufacturer did not act in "good faith" in bringing about the termination. The federal district court had jurisdiction of such claims pursuant to 15 U.S.C.§ 15 (1976), 15 U.S.C.§ 1222 (1982), 28 U.S.C.§§ 1331, 1332, and 1337 (1982), and the principle of pendent jurisdiction. In support of its claim, POF produced evidence at trial to establish that, at PACCAR's insistence and upon PACCAR's promise to

[1] As used herein, "PX-____" refers to plaintiffs' exhibits; "T.____" refers to the trial transcript; "R.____" refers to the record on appeal; and "A.____" refers to the Appendix to this Petition.

provide direct financial assistance and an adequate supply of new trucks, POF engaged in a costly expansion program beginning in 1973, establishing dealership locations in Jacksonville, Fort Lauderdale, and Tampa, in addition to its existing and profitable location in Orlando; that PACCAR provided no financial assistance; and despite the testimony of PACCAR's sales manager that POF needed from 25 to 30 trucks a month (300 to 360 a year) to profitably operate these additional locations (PX-46), the evidence demonstrated that in *no* year subsequent to expansion (except the recession period of 1975-76), was POF able to obtain the trucks necessary to run a successful dealership. In addition to the testimony of plaintiffs' expert, the documentary evidence (all from PACCAR's files) demonstrated that POF's days' supply of new trucks was consistently lower than the average for other PACCAR dealers (PX-295), thus showing that POF received fewer trucks and had to wait longer for those trucks than other dealers. Additionally, PACCAR's documents showed that during years of high demand and truck allocation, other dealers in the same region were receiving substantially higher allocations. *See, e.g.*, PACCAR's "PERFORMANCE REVIEW" for 1977 (PX-113):

Dealer	Allocation	Delivered	% of Allocation
Peterbilt of Knoxville	200	759	380%
Ed Wright Trucks	100	195	195%
Easom Truck Sales	200	353	177%
Nalley Truck Sales	275	399	145%
Peterbilt of Florida	150	165	110%

POF contended that the discrimination in allocation was deliberately undertaken to force POF out of business in accordance with a decision reached by PACCAR managment late in 1975 or early in 1976 (and documented by internal secret memoranda, PX-71, 72, 74 and 75), to terminate POF at the conclusion of its term agreement and that PACCAR

would build "a file to support cancellation" (PX-75), so as to avoid the possibility of litigation it might lose (P..-72). Indeed, a PACCAR official told a disinterested prospective dealer more than a year prior to termination that there was "no set of circumstances [including a floor plan commitment] which would allow a renewal of the [POF] franchise" (T.1443-44).

Following a five week trial, the jury returned a verdict on special interrogatories, finding that PACCAR violated the Federal Dealers Act and awarding POF damages of $680,269.00[2] (R.2873-76; A.33-36). The court entered judgment on the jury verdict (R.2877; A.30-32).

Upon PACCAR's motions directed to the judgment, the district judge denied the motion for JNOV, but granted the alternative motion for new trial, stating:

> "It is this Court's opinion that the admission of Dr. Westbrook's testimony (the expert who testified on behalf of plaintiff) as support for both liability and damages was in error and that it was completely speculative. Without such evidence the plaintiff could not have prevailed." (R.3188-89; A.28)

The Order gave *no* other basis for granting the new trial. Petitioners thereafter moved, pursuant to Rule 60(b), Federal Rules of Civil Procedure, for the court to correct its judgment in order to conform its reasoning regarding the order of new trial to the former motion and in order to allow petitioners to bring an immediate appeal. The district court granted a motion for JNOV and, alternatively, the motion for new trial (R.3371-75; A.24-27).

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[2]The jury also found in favor of POF and against PACCAR on the Florida Dealers Act claim [Fla.Stat.§ 320.60 *et seq.* (1979)], and in favor of James E. Deas (the sole owner of POF) upon the claim that PACCAR had interfered with a prospective business relationship between him and Wendell Doonan (another PACCAR dealer who had agreed to purchase property owned by Deas to give him the capital necessary to meet financial demands made by PACCAR), and awarded damages of $175,682.00 (R.2873-76; A.33-36).

The Court of Appeals, in its decision, *Deas* v. *PACCAR, Inc.*, 775 F.2d 1498, 1502 (11th Cir.1985) (A.10-11), acknowledged the "unusual procedural history" of the case, although it noted that it was "almost identical" to the procedural history in *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171 (6th Cir.1981). The Eleventh Circuit also noted *National Polymer's* reliance on the opinion of this Court in *Thomsen v. Cayser*, 243 U.S.66 (1917), but determined *not* to "fully accept the Sixth Circuit's method of reviewing the trial record and dispositive orders." 775 F.2d at 1503 (A.12). Instead, the Eleventh Circuit determined to "accept jurisdiction of this appeal" while refusing

> "to apply the J.N.O.V. standard but instead apply the less strict standard of review used in determining whether the district court erred in granting the new trial. In other words, we allow the appellant to consent to the grant of the J.N.O.V. as a vehicle to make the judgment final and to reach this court. However, we review only the ruling by the district court which was initially adverse to the plaintiff/appellant below, that is, the grant of a new trial." 775 F.2d at 1503 (A.13).

The court thereupon reviewed the district court's grant of a new trial and, with regard to the decision on the federal Dealers Act claim, held that "the evidence before the jury on the discrimination issue was deficient." 775 F.2d at 1506 (A.19). The court based its decision on its determination that petitioners had adduced insufficient evidence regarding POF's allocations as compared to other Peterbilt dealers and regarding PACCAR's allocation system in general, including the possibility of other reasons for allocation irregularities such as strikes, etc. 775 F.2d at 1506-1507 (A.19-21). Absent such evidence, the Eleventh Circuit held that the jury could not have a clear understanding of PACCAR's normal allocation system and could not determine whether PACCAR

"purposely deviated from its normal allocation system when it allocated trucks to P.O.F." 775 F.2d at 1507 (A.21). Accordingly, the Eleventh Circuit affirmed the order granting a new trial and, notwithstanding its express decision not to review the JNOV, affirmed the JNOV as well, thereby precluding petitioners from the new trial it had determined was warranted. This petition followed.

ARGUMENT

Point I

The decision of the Eleventh Circuit herein emasculates the Federal Dealers Act by requiring plaintiffs to produce direct evidence of discrimination - to the exclusion of all non-discriminatory explanations - and denying the use of reasonable inferences of discrimination derived from evidence of the course of dealings between the parties.

In enacting the Automobile Dealers Day in Court Act, 15 U.S.C.§§ 1221-1225 (1982), Congress sought to assure dealers "an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, cancelling, or not renewing his franchise." H.R.Rep.No.2850, 84th Cong., 2d Sess.1, *reprinted in* 1956 U.S.Code Cong. & Ad.News 4596, 4600. To establish a prima facie case, Congress required that plaintiffs prove by a preponderance of the evidence that: (1) the manufacturer failed "to act in good faith" in refusing to renew the franchise (15 U.S.C. § 1222); (2) the manufacturer's conduct amounted to "coercion, intimidation or threats of coercion or intimidation" [15 U.S.C.§ 1221(e)]; and (3) the dealer sustained damages as a result of that

conduct (15 U.S.C.§ 1222). While these elements clearly indicate Congress' intent to place considerable discretion in the hands of the jury when adjudicating such claims, Congress also expressly emphasized this need: "[i]n each case arising under [the Act], good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation." H.R.Rep. No.2850, 84th Cong., 2d Sess.1, *reprinted in* 1956 U.S. Code Cong. & Ad. News 4596, 4603. Significantly, Congress also recognized that "[t]he existence of coercion or intimidation depends upon the circumstances arising in each particular case *and may be inferred from a course of conduct." Id.* (emphasis added).

Prior to the decision *sub judice,* the courts consistently followed this Congressional intent and allowed plaintiffs to base their Dealers Act claims on evidence of the course of dealings between the parties and on reasonable inferences derived therefrom. In *Marquis v. Chrysler Corp.,* 577 F.2d 624, 634 (9th Cir.1978), for example, the Ninth Circuit recognized that "[t]he manufacturer's wrongful demand can be implicit, inferable from 'all of the facts and circumstances without a showing of a formal demand' " [quoting *Diehl & Sons, Inc. v. International Harvester Co.,* 426 F.Supp.110, 124 (E.D.N.Y.1976)]. The Fifth Circuit in *York Chrylser-Plymouth, Inc. v. Chrysler Credit Corp.,* 447 F.2d 786, 793 (5th Cir.1971), similarly recognized that "[t]he entire course of dealing between manufacturer and dealer may be considered and it may then be concluded by the jury that the total conduct was violative of the Act" (footnote and citation omitted). *See also Shor-Line Rambler, Inc. v. American Motors Sales Corp.,* 543 F.2d 601, 604 (7th Cir.1976) ("The issue of American Motors' bad faith involves its intentions as manifested by its actions. This is a factual determination for the jury.") (citation omitted); *Rea v. Ford Motor Co.,* 497 F.2d 577, 585 (3d Cir.), *cert.denied,* 419 U.S.868 (1974) ("whether a manufacturer has acted with sufficient justification to

constitute good faith in bringing pressure to bear on a dealer is a factual question the determination of which will depend on the circumstances arising in each particular case") (footnote omitted); *American Motors Sales Corp.* v. *Semke,* 384 F.2d 192, 197-98 (10th Cir.1967); *cf. Jay Edwards, Inc. v. New England Toyota Distributor, Inc.,* 708 F.2d 814, 818-19 (1st Cir.), *cert.denied,* 464 U.S.894 (1983) (interpreting New Hampshire equivalent of federal Act, held evidence of troubled relations and unexplained disparate allocation sufficient evidence for jury to find violation). By its decision, however, the Eleventh Circuit implicitly rejects these decisions, refuses to follow the clear intent of Congress, and effectively emasculates the Act by establishing a burden of proof for plaintiffs which, for all practical purposes, will be impossible to satisfy.

The Eleventh Circuit specifically held that a new trial was required on petitioners' Dealers Act claim because petitioners did not adduce sufficient direct evidence of PACCAR's discriminatory allocation of trucks as compared with other dealers, nor of PACCAR's allocation system in general, including the methods and causes of the allocation and the effect of strikes or other production delays on allocations. Without such evidence, the court held that the jury could not have a clear understanding of how PACCAR's allocation system worked and whether PACCAR purposely deviated from such in dealing with petitioners. This holding, particularly in light of the evidence adduced below, effectively establishes an impossible burden of proof on plaintiffs to introduce direct evidence of discrimination to the exclusion of all other non-discriminatory explanations for insufficient allocations. It precludes plaintiffs, as intended by Congress and as interpreted by the courts, from proving such discrimination by reasonable inferences derived from general evidence of the course of dealings between the parties.

In addition to the extensive evidence of coercion by PACCAR discussed *supra* at 2 - 4, and contrary to the

holding of the Eleventh Circuit, POF introduced substantial evidence regarding PACCAR's allocation system and the course of dealings between parties. Indeed, PACCAR represented at trial that it had produced all information in its possession regarding its allocation system (10/14/82 Excerpt), and POF offered all such information into evidence at trial. This evidence consisted of substantial documentary evidence from PACCAR's records, including PACCAR's actual factory logs (PX-319) which significantly identified *every type of truck ordered by every dealer* and the dates they were ordered, when production began, and when they were delivered to the dealer; the factory logs also showed that trucks ordered by POF in 1977 were not delivered until 1979 (T.1603) and that during 1977 and 1978, the average delay between order and delivery was longer for POF than other dealers (T.1600); PACCAR's Composite Balance Sheets for Peterbilt Dealers (PX-295) which revealed that during 1977 and 1978 POF's supply of trucks was significantly lower than the average for other dealers; and a PACCAR "PERFORMANCE REVIEW" document (PX-113), summarized *supra* at 3, which established a substantial disparity between between POF's supply of trucks and that of the other dealers in the southeastern region. This documentary evidence alone must be considered sufficient evidence of PACCAR's allocation system to allow the jury reasonably to determine whether PACCAR deliberately discriminated in its allocation and delivery of trucks to petitioners.[3]

Moreover, POF supplemented this documentary evidence with the testimony of its expert witness, Dr. Robert A. Westbrook, who concluded that POF's "termination was not

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[3]Indeed, the district court initially recognized such when, in denying PACCAR's motion for directed verdict at the close of plaintiffs' case, it held that "[t]he Exhibit that went into evidence . . . [PX-113] containing quotas for 1977, Southeast Region, and the actual factory deliveries, I think without explanation is sufficient in itself for a prima facie case . . . based on contentions of discrimination which could be a violation of both the Acts" (10/12/82 Excerpt at 4).

warranted from a marketing standpoint" (T.1579), based on (1) his review of POF's sales performance over time as compared to authoritative industry data (T.1532-42), other dealers in the region[4] (T.1542-44) and in an absolute sense (T.1545-53); and (2) information on POF's inventory level and sales efforts obtained from PACCAR (T.1553-60). Dr. Westbrook also testified that POF's termination "was not warranted from a financial standpoint" (T.1585), based upon his review of its financial statements, PACCAR's "composite financial reports," and Peterbilt 20 Group reports (T.1579-85). Finally, Dr. Westbrook testified that PACCAR failed to deliver enough trucks in 1977 and 1978, or to deliver such trucks in a timely manner so as to allow POF "to continue in business" (T.1588-89, 1600-01). Dr. Westbrook founded this conclusion on his analysis of PACCAR's production logs and various other documents produced by PACCAR (T.1589-1600)[5].

To conclude, as did the Eleventh Circuit, that despite such evidence petitioners were also required to produce more evidence of "the method of allocating trucks to dealers, the causes of the allocation system, and the effect strikes and similar production delays had on the system," 775 F.2d at 1507 (A.21), simply places an impossible burden on a dealer. If the evidence adduced below, which again, PACCAR

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[4] Even if one of the dealers Dr. Westbrook considered was not a Southeast dealer or was more profitable, the existence of such differences did not render *all* comparisons of such slight evidentiary value that his testimony was inadmissible. *See Marquis v. Chrysler Corp.*, 577 F.2d 624, 638 (9th Cir.1978); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 999 (5th Cir.1976). Indeed, the district court initially recognized such, ruling repeatedly during trial that such differences related to the weight and not the admissibility of Dr. Westbrook's testimony (*e.g.* T.1529, 1927; 10/7/82 Excerpt at 7).

[5] The above-discussed evidence is not intended to reflect all the relevant evidence POF introduced at trial. Rather, POF merely cites to the Court those portions of the record which make clear that the jury had sufficient evidence to understand PACCAR's allocation system and to determine from the course of dealing between the parties that PACCAR discriminated against POF as the evidence reasonably suggested.

represented included all the information it possessed (10/14/82 Excerpt), is not sufficient to bring a claim under the Act, then it is difficult to determine when a claim could be made. Moreover, if petitioners are not entitled, as Congress intended, to rely on the reasonable inferences of discrimination derived from evidence of the course of dealings between the parties, but instead must prove such discrimination directly and to the exclusion of all other possible explanations for allocation irregularities, then assuredly no claim could ever be made under the Act.

Such a result, however, is apparently the foundation of the Eleventh Circuit's opinion herein as well as its most recent decision, *Carroll Kenworth Truck Sales, Inc. v. Kenworth Truck Co.,* Nos. 85-7119 and 85-7139 (11th Cir. Feb. 10, 1986), where in another Federal Dealers Act case involving PACCAR, the Eleventh Circuit reversed the district court and entered JNOV in favor of the manufacturer notwithstanding a jury verdict for the plaintiff. The Eleventh Circuit emphasized therein its interpretation of the limited applicability of the Federal Dealers Act — an interpretation that, again, is unique among the federal courts of appeals and contrary to Congressional intent — stating:

> "If such bare facts as these are held to be sufficient to create a jury question on the issue of good faith as defined in the statute, we see no end to rightfully terminated dealers hauling manufacturers into court in anticipation of a free shot at a jury verdict, even when there is no evidence to support a verdict in their favor. Such a result is altogether inconsistent with the restricted definition of good faith in the Automobile Dealer's Day in Court Act." *Id.* slip op. at 2009.

As stated *supra,* the various appellate courts which have addressed the issue of the proper burden of proof under the Act have allowed evidence of the course of dealings between the parties and the reasonable inferences derived therefrom to support claims. This Court has not yet had occasion to

address this important federal question. Accordingly, petitioners submit that a writ of certiorari to the Court of Appeals for the Eleventh Circuit should issue enunciating the proper burden of proof in federal Automobile Dealers Day in Court Act cases, and remanding the instant case for entry of judgment on the jury verdict on such claims.

Point II

On appeal of an order granting JNOV and alternatively a new trial, the appellate court cannot refuse to review the JNOV, review only the order granting a new trial and upon affirming such, affirm the JNOV so as to deprive petitioners of a trial by jury.

Despite petitioners' appeal of both the district court's decision to grant JNOV in favor of PACCAR and alternatively to order a new trial, the Eleventh Circuit held that it would "review only the ruling by the district court which was initially adverse to the plaintiff/appellant below, that is, the grant of a new trial." 775 F.2d at 1503 (A.13). The Eleventh Circuit stated that "[f]airness to both parties and the district court dictate this method of review, " 775 F.2d at 1503 (A.13), implying - the court provided no further explanation - that because JNOV was entered pursuant to petitioners' Rule 60(b) motion, it was unfair to allow petitioners to challenge such judgment on appeal. Significantly, the Eleventh Circuit cited no case law to support this unique holding.

This Court has, however, previously addressed and rejected the Eleventh Circuit's rationale and holding. In *Thomsen v. Cayser,* 243 U.S. 66 (1917), the plaintiffs similarily persuaded an appellate court to dismiss their case rather than remand it for a new trial in order that they might bring an immediate appeal. The defendant thereupon argued

to this Court that since the appellate court entered judgment upon plaintiffs' motion, plaintiffs could not thereafter challenge it. This Court, however, rejected this argument and recognized that "[t]he plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay." 243 U.S. at 83. *Cf. United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958) (appeal from dismissal proper notwithstanding fact that government moved for such because of its failure to obey discovery order that it had argued and lost on merits and was only seeking an expeditious review). The Court of Appeals for the Sixth Circuit in *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171 (6th Cir.1981), a case which the Eleventh Circuit recognized as directly on point,[6] expressly followed *Thomsen* and similarly rejected such argument, noting that the JNOV "though perhaps indirectly and in a very loose sense solicited by [appellant], was not voluntary. It was a calculated reaction to the inconsistency between the court's ruling and reasoning on the substantive issues." 660 F.2d at 177. Both the *Thomsen* Court and the *National Polymer* court properly examined the judgment on appeal before them.

The express refusal of the Eleventh Circuit similarly to review the JNOV entered by the trial court - "[w]e do not fully accept the Sixth Circuit's method of reviewing the trial record and dispositive orders," 775 F.2d at 1503 (A.12) - raises a clear conflict within the federal courts of appeal and directly conflicts with the applicable decision of this Court on this important issue of federal law. Moreover, the Eleventh Circuit's affirmance of the JNOV notwithstanding its express refusal to review this order, constitutes a clear departure

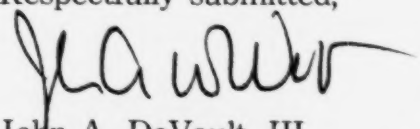
[6] In discussing *National Polymer*, the Eleventh Circuit recognized that "[t]he scenario is the same here." 775 F.2d at 1503 (A.12).

from the accepted and usual course of judicial proceedings and requires the exercise of this Court's supervisory powers so as to ensure petitioners their constitutional right to jury trial. Although the trial judge's initial order granting the new trial clearly was based on his view as to the weight of the evidence (R.3188-89; A.28-29), and the Eleventh Circuit acknowledged that ordinarily in such circumstances it would "exercise close scrutiny out of deference to the right of a litigant to have a jury determination of the facts," 775 F.2d at 1503, here it refused to do so and instead accepted the trial judge's after-the-fact statement that he granted the "'motion for new trial for a number of reasons,'" 775 F.2d at 1504, in order to justify the least searching standard for review. Thereby petitioners were deprived of their right to a trial by jury in accordance with the seventh amendment to the Constitution.

CONCLUSION

For the above-stated reasons, petitioners respectfully request the Court to issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit enunciating the proper burden of proof in Federal Dealers Act cases and remanding the instant case for entry of judgment on the jury verdict on such claim.

Respectfully submitted,



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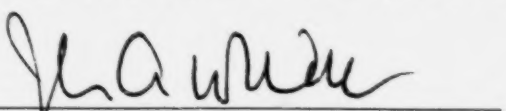
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that, pursuant to Sup.Ct.R.28.3, three copies of the foregoing have been furnished to Eli H. Subin, Esquire, Suite 670, CNA Tower, Orlando, Florida 32802, Attorney for Respondent, by depositing said documents in a United States mailbox, with First Class postage prepaid, this 26th day of February 1986.



Attorney

APPENDIX

In the
Supreme Court of the United States

October Term, 1985

JAMES E. DEAS and PETERBILT
OF FLORIDA, INC., a Florida corporation,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3182

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
DEC 26 1985
SPENCER D. MERCER
CLERK

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida Corporation,

Plaintiffs-Appellants,

versus

PACCAR, INC., a Delaware Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING
(DECEMBER 26, 1985)

BEFORE: RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is denied.

ENTERED FOR THE COURT:

s/ Thomas A. Clark
United States Circuit Judge

REHG-4
(Rev. 9/85)

James E. DEAS and Peterbilt of Florida, Inc., a Florida Corporation, Plaintiffs-Appellants,

v.

PACCAR, INC., a Delaware Corporation, Defendant-Appellee.

No. 83-3182

United States Court of Appeals, Eleventh Circuit.

Nov. 14, 1985

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

CLARK, Circuit Judge:

This is an appeal by James E. Deas (Deas) and Peterbilt of Florida, Inc. (P.O.F.) from an order granting PACCAR, Inc. (PACCAR) a new trial. Deas is the President and sole stockholder of P.O.F., formerly an exclusive Peterbilt truck dealer. PACCAR is the manufacturer of Peterbilt Trucks. One of PACCAR's divisions is Peterbilt Motors Company (Peterbilt).

Deas and P.O.F. filed this action against PACCAR, Inc. for: (1) violation of the Federal and Florida Dealer Day in Court Acts; (2) fraud with respect to the nondisclosure of facts regarding prospective loans, supplies of new trucks for resale, and P.O.F.'s status as a dealer; and (3) tortiously

interfering with P.O.F.'s business relationships. P.O.F.'s claims based on the Federal and Florida Acts and Deas' claim of tortious interference with a prospective business relationship were the only claims submitted to the jury. The jury found that PACCAR, through its Peterbilt Motors Company Division, violated the Florida and Federal Acts and tortiously interfered with a prospective business relationship held by Deas.

PACCAR filed a motion for judgment notwithstanding the verdict (J.N.O.V.) and an alternative motion for a new trial. The district court, after a hearing, denied the motion for J.N.O.V. and granted PACCAR's alternative motion for a new trial. In its order, the court stated:

> It is this Court's opinion that the admission of Dr. Westbrook's testimony (the expert who testified on behalf of plaintiff) as support for both liability and damages was in error in that it was completely speculative. Without such evidence the plaintiff could not have prevailed . . . .

Record, Vol. 13 at 3188.

Deas and P.O.F. requested the court to enter a judgment notwithstanding the verdict so that an immediate appeal could be taken. The plaintiffs stated that they could not establish any better case on retrial and that they could not afford a retrial. They thus wanted to win or lose based on the record made at trial. The court granted the motion for judgment notwithstanding the verdict and PACCAR's alternative motion for a new trial. The procedural aspect of this appeal is discussed *infra* in § II.

I. FACTS

Deas and a co-partner purchased a truck dealership in Orlando in 1966. At that time, the company operated under a different name and was not an exclusive Peterbilt distributor.

In 1970, Deas became the president and sole stockholder of

the company. With the permission of Peterbilt, Deas changed the dealership name to Peterbilt of Florida and thereafter sold Peterbilt Trucks exclusively.[1] The initial distributor's contract between Deas and Peterbilt was signed in February, 1971 and could be terminated by either party by giving thirty days notice.

In 1971 and 1972, Peterbilt encouraged Deas to sign a new distributor contract and to expand to other markets in Florida. Although Deas objected to certain provisions of the contract and to the plans for expansion, he eventually signed the new contract and in 1973 embarked on an expansion program which his accountant had advised was not prudent. The contract provided that additional facilities would be necessary when required and did not obligate Peterbilt to lend any financial support to P.O.F.

Deas testified that he believed that PACCAR would provide him with all of the trucks he needed and with financial assistance when he reluctantly agreed to expand. He related that he discussed the expansion efforts with PACCAR's General Manager and General Marketing Manager. They told him that it was necessary for him to expand his operation so the company could achieve greater market penetration. Deas responded that P.O.F. was centrally located, that he did not have the money for the proposed expansion, and that more trucks would be needed. According to Deas, they assured him that he would be able to obtain all of the trucks he needed and that he would receive assistance in financing. *Record* Vol. 1 at 194. Benny L. Bailey, PACCAR's Eastern Region Credit Manager, corroborated Deas' opinion about obtaining financial assistance during the expansion. Although he also indicated that Deas probably misunderstood the statements of PACCAR's representatives, he testified that Deas informed him that Deas had been

[1]The contract did not require Deas to sell Peterbilt Trucks exclusively. The evidence demonstrated that several Peterbilt dealers sold other brands.

offered financial assistance. *Record,* Vol. 24 at 1238.[2]

Bailey convinced Deas to apply for wholesale financing from Associates Finance (Associates).[3] As a result, Deas and Associates entered into an agreement in which Associates extended wholesale financing so that P.O.F. could obtain its inventory. *Record,* Vol. 20 at 220-221. Deas did not receive any direct financial assistance from Peterbilt.

From 1971 to 1974 P.O.F. received outstanding performance awards from Peterbilt. However, P.O.F.'s subsequent financial performance was not as outstanding. P.O.F. had a negative net worth from 1975 to 1978.[4] Its accountant, Carson Eddy, testified that P.O.F.'s financial problems were the result of a lack of operating capital. Eddy also testified that P.O.F.'s accounting procedures were deficient; although, he did not feel they affected P.O.F.'s profits.[5]

Eddy rendered his opinion about the causes of P.O.F.'s financial condition:

> In 1974 and '75, I believe they had some problems with strikes at the factory which caused Mr. Deas not to have enough trucks available for sale. I think that was during 1970—I can't recall the exact date—I think it was '73 and '74 was the strike.
>
> Right after that, they went on allocations, I believe,

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[2]The correspondence between Deas and the Peterbilt managers demonstrates that financial assistance was discussed frequently. Plaintiff's Exhibits 18, 25, 26, 133, 139.

[3]Associates had a repurchase agreement with Peterbilt in which Peterbilt would repurchase any new trucks that had to be repossessed because of a dealers default on a wholesale financing. The contract was beneficial to PACCAR and Peterbilt dealers because it induced Associates to furnish wholesale financing to the dealers. It was beneficial to Associates because it provided Associates with an opportunity to provide financing to retail customers. *Record,* Vol. 24 at 1235.

[4]PACCAR's Eastern Region Credit Manager testified that P.O.F. had not had serious cash flow problems prior to this period. *Record,* Vol. 24 at 1244.

[5]During this period P.O.F. also wrote several checks to PACCAR and Associates for which there were insufficient funds in its bank account. It also collected funds for vehicles sold and did not pay Associates.

and weren't able—they weren't able to get enough trucks to sell and had too much overhead with all the branches. . . . .

[B]y using internal capital at the time for expansion, at the time that recession hit, they did not have internal funds available to carry on those operations; and therefore, had to go to outside short-term lending at very high interest rates at that time.

Record, Vol. 23 at 941, 943.

PACCAR's Eastern Region Credit Manager had a similar observation regarding the cause of P.O.F.'s financial problems:

QUESTION: Did you investigate the source of the problem?

ANSWER: Yes.

QUESTION: What did you determine?

ANSWER: That it developed over a period of time beginning with a shortage of trucks to sell in 1975 and subsequently carried into 1976, creating the shortage where he couldn't pay a parts statement on a monthly basis . . . .

Record Vol. 24 at 1244.

In January, 1975 Deas contacted Joseph Dunn, the General Manager of the Peterbilt Division, because P.O.F.'s distributor's contract was near the date of expiration. On March 20, 1975, Dunn recommended that the contract be renewed for a three year term. *Record,* Vol. 24 at 1208.[6] Dunn left the position of General Manager in August, 1975 and was replaced by Ug Rohr.

When Rohr became General Manager he apparently brought with him a change of philosophy with regard to the

[6] According to Dunn, the only other item to be completed after his approval was the signing of the formal contract by Deas and himself. Dunn did not know why the signing of the contract was delayed.

renewal of distributor's contracts in general and P.O.F.'s contract in particular.[7] One employee observed that Rohr's policy was to eliminate all dealers who were not selling an adequate amount of trucks and who were having financial problems. *Record,* Vol. 24 at 1251-52. Under Rohr's administration, several memos regarding the Florida market and P.O.F.'s performance were generated. The memos directed employees to check on getting new dealers in Florida; suggested that Peterbilt might need to develop a plan to terminate amicably its relationship with P.O.F.; and advised Rohr to seek legal assistance in order to determine the documentation needed to support a cancellation of P.O.F.'s contract.[8] Deas stated that he was unaware of Peterbilt's concerns regarding P.O.F.'s performance.

Deas testified that he received the three-year renewal contract on February 19, 1976, one year after it had been approved.[9] However, the renewal contract was dated as being signed on December 15, 1975.

The 1975 distributor's contract provided that the distributor would "maintain a sales and service organization which will be adequate to develop the potential of his market area . . ." and at "such time as sales show the requirement for additional facilities within the market area, the distributor will be expected to establish outlets in such locations." Plaintiff's Exhibit 68 at 1. The contract also required P.O.F. to invest "working capital and maintain lines of credit necessary to realize the full potential of [its] market area." *Id.* Peterbilt agreed to "use its best efforts to make

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[7] It appears that Deas was never a "favorite" of Peterbilt. PACCAR and Peterbilt employees testified that he was a "difficult dealer" to get along with and that his facilities were not representative of an exclusive Peterbilt dealer with respect to appearance, design, and size. *See, e.g., Record,* Vol. 24 at 1188; 1211-12; 1232-33.

[8] Plaintiff's Exhibits 71-75.

[9] *Record,* Vol. 21 at 306. Deas' testimony was corroborated by a Dealer Contact Report, which indicated that contact was made with the dealer on February 19 and 20, 1976. Tom Root, who was Southeast Dealer Sales Manager, stated that he delivered the signed Peterbilt three-year contract to Deas.

shipments on or before the dates specified in orders accepted from the Distributor" but did not agree to be responsible "for failure to deliver goods on time or to fill orders where prevented by . . . strike or labor disturbances . . . or if the demand for goods [exceeded Peterbilt's] available supply . . . ." *Id.* at 2.

Presumably, strikes and the increased demand for trucks caused Peterbilt to allocate trucks to its dealers from 1975-76 until 1977-78.[10] Deas was disturbed with his truck quotas because he felt they were insufficient to allow him to operate profitably. Peterbilt's Southeastern Sales Manager, however, testified that the allocation of trucks prevented all of the dealers in his region from obtaining the number of trucks ordered.[11]

Deas testified that in January, 1978 he was forced to close one of his four facilities because he could not obtain sufficient equipment to make a profit.[12] Rohr responded to Deas' action by deleting several South Florida counties from Deas' market and by instituting a corresponding reduction of Deas' sales quota.[13] As a result of these actions, P.O.F. sued Peterbilt for the return of its South Florida territory.

In December, 1977 Associates notified Deas of its intention to cancel P.O.F.'s new truck wholesale line of credit because Deas had changed his sales efforts from retail customers (upon which Associates made the bulk of its money) to wholesale customers. Associates extended the date of cancellation to 1978 in order to coincide with the term of P.O.F.'s distributor contract.

It was during this stormy period that P.O.F.'s distributor contract was near the date of its expiration. Because Deas

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[10] *Record,* Vol. 24 at 1191, 1199. The record is not entirely clear on the reasons for the allocation system or the exact date upon which the allocation system was instituted. However, the issue of the need to allocate was not in dispute.

[11] *Id.* at 1198.

[12] *Record,* Vol. 21 at 319-20.

[13] Plaintiff's Exhibit 129.

had not obtained alternate financing, Peterbilt conditioned a one-year renewal of the dealership on P.O.F.'s improving its financial condition and obtaining new financing.[14]

As a last attempt to improve P.O.F.'s financial position, Deas entered into negotiations with a Peterbilt dealer named Wendell Doonan.[15] Deas' proposal, which was subject to Peterbilt's approval, was that Doonan would purchase a piece of Deas' property for $440,000 and assume P.O.F.'s Tampa sales territory. Deas informed Rohr of the proposal.

The deal between Deas and Doonan was never executed, primarily because of a call to Doonan from a PACCAR Vice President advising him not to develop his operations in Tampa.[16] Because P.O.F. did not obtain inventory financing for the one-year term of its proposed renewal, PACCAR did not renew P.O.F.'s contract.[17]

II. THE PROCEDURAL BACKGROUND

This case comes to us on appeal with an unusual procedural history. As mentioned previously, the district court initially granted PACCAR's motion for a new trial and denied its motion for judgment notwithstanding the verdict. Plaintiffs then filed a Rule 60 motion, asking the court to enter a judgment notwithstanding the verdict so they could take an immediate appeal. PACCAR agreed to the

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[14] Plaintiff's Exhibit 171.

[15] Deas claims that if its financial position had improved, Associates would have reinstated its wholesale line of credit. PACCAR points out that Associates did not cancel the credit because of Deas' financial condition, but because P.O.F. stopped selling retail accounts.

[16] Doonan discussed the conversation:

> Joe called me one day and told me he wished I'd back off, that he felt like I had all the eggs in one basket and he felt like I'd be a lot better off—he called me as a personal friend, not as Joe Dunn, Manager of Peterbilt/Kenworth.
> He said, "Hey, me and you is friends, have been friends for a long time. I just wish you would back off. You're a very valuable man in Great Bend, Kansas, but you could get yourself spread too thin and get yourself in trouble in Tampa, Florida." That probably was my turning point on thinking about going to Tampa.

Record Vol. 24 at 1409.

[17] Plaintiff's Exhibit 190.

procedure. Although the court recognized that the judgment notwithstanding the verdict was a harsh remedy under the circumstances, it granted the motion and the alternate motion for a new trial.

The procedural history in *National Polymer Products, Inc. v. Borg-Warner Corporation,* 660 F.2d 171 (6th Cir.1981) is almost identical to this case. In *National Polymer,* the defendant moved for a judgment notwithstanding the verdict, a new trial, or in the alternative a remittitur. The court considered the motion for judgment nothwithstanding the verdict to present a close question; however, it ultimately granted the motion for a new trial. National Polymer subsequently filed a Rule 60 motion asking the court to correct its memorandum decision by entering, among other things, a judgment notwithstanding the verdict. National Polymer admitted that its reason for seeking a judgment notwithstanding the verdict was that it wanted to obtain immediate appellate review of the trial court's decision.

Citing *Thomsen v. Cayser,* 243 U.S. 66, 83, 37 S.Ct. 353, 358, 61 L.Ed 597 (1917), the court of appeals found that the procedure utilized was permissible.

> . . . "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.". . .
>
> Here, the lower court order granting a new trial was interlocutory and unappealable. National Polymer persuaded the trial court to change its verdict to reflect its reasoning. That alteration produced a final judgment, a dismissal, allowing this appeal to be maintained.

Id. at 177 (citations omitted).

We accept jurisdiction in this case since the district court entered a J.N.O.V. and ordered a new trial, the J.N.O.V.

having been solicited by appellant to secure an appeal. We do not fully accept the Sixth Circuit's method of reviewing the trial record and dispositive orders. In *National Polymer, supra,* that Circuit reviewed the case using two standards of review. When the standard applicable to a J.N.O.V. was applied, the court found the district court erred; yet, when it applied the standard applicable to the grant of a new trial, it found that the district court did not err and returned the case for another trial. The result was that the Circuit permitted appellant to confer appellate jurisdiction upon the court pursuant to its consent that the district court change its denial of a J.N.O.V. to a grant of J.N.O.V.

The scenario is the same here. In their oral argument, in support of their motion to enter judgment for the defendant on both grounds, counsel stated:

> We have represented in our Motion that we're satisfied with the Brief we've presented. That because of the circumstances of these Plaintiffs, we're unable to go forward with the expense of a new trial. We further stated that if we were to go on with a new trial, we would present the same testimony upon which we relied at the initial case and including that of Dr. Westbrook, which if this Court's ruling was correct and this Court or any other Court is consistent with the Court's ruling would be required to grant a directed verdict.
>
> We submit then, Your Honor, that in the proper administration of justice, it is far better for this Court and for the parties to have this matter finally and conclusively as determined by the Court of Appeals on now a full Record, after a full hearing, argument and a Jury verdict.

Record, Vol. 16 at 6-7.

Normally the grant of a new trial is an interlocutory order, not subject to appellate review unless coupled with the grant

of a J.N.O.V. as provided in Fed.R.Civ.P. 50(c). While we accept jusrisdiction of this appeal, we refuse to apply the J.N.O.V. standard but instead apply the less strict standard of review used in determining whether the district court erred in granting the new trial. In other words, we allow the appellant to consent to the grant of the J.N.O.V. as a vehicle to make the judgment final and to reach this court. However, we review only the ruling by the district court which was initially adverse to the plaintiff/appellant below, that is, the grant of a new trial. Fairness to both parties and the district court dictate this method of review.

The standard of review applicable to the grant of a new trial is generally said to be that of a determination of whether the district court abused its discretion. However, this general principle is dependent largely upon the basis of the district court's grant of the new trial. *See Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir.1982), and *Williams v. City of Valdosta*, 689 F.2d 964, 972 (11th Cir. 1982). Where the grant is on the ground that the verdict is against the weight of the evidence, we exercise close scrutiny out of deference to the right of a litigant to have a jury determination of the facts. *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 94-5 (5th Cir.1975). We have said that there are some gradations in the strictness of our review in those instances where the issues are highly complex, being more strict in our review when the issues are simple and the outcome largely dependent upon the credibility of witnesses. *See Williams v. City of Valdosta, supra,* at 974.

Additionally, there is a distinction between a new trial awarded because the verdict was against the weight of the evidence and one awarded for other reasons. As adopted in *O'Neil v. W.R. Grace & Co.*, 410 F.2d 908 (5th Cir.1969):

> New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted,

prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, (2), supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the winesses for that of the jury . . . . It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial . . . .

Id. at 914 (quoting from *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.1960), *cert. denied* 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960)).

In this case it is clear that the trial court granted a new trial for several reasons. In response to a suggestion that the new

trial had been granted solely on evidentiary grounds the district court responded:

> In the first place, I think the record is clear that I granted a motion for a new trial for a number of reasons—

Record Vol. 16 at 14-15; *see also Record* Vol. 17 at 36-45 (various reasons for grant of new trial); *Record,* Vol. 13 at 3188 (written order).

The court pointed out that *International Harvester Company v. Calvin,* 353 So.2d 144 (Fla.Dist.Ct.App.1977), required an additional instruction to the effect that "if there was a good reason for the nonrenewal that then even if there were other grounds which were not priority that the valid reason would have precluded recovery under the Florida Act." *Record* Vol. 17 at 43. The court indicated that it should have given an instruction on the mitigation of damages requirement. However, it did not base its ruling on this factor alone.

In addition the court found that several essential factors were not clearly shown by either party. Some of these factors were: (1) the total number of trucks that were produced and available to P.O.F.; (2) the reasons for the quota system and whether Peterbilt deliberately allocated less trucks than it could have allocated under the system; and (3) the effect that the strikes had on deliveries and allocations. The court was also concerned that neither party had presented sufficient evidence with respect to the amount of profits that could have been generated or lost in the Fort Lauderdale market that was taken from P.O.F.

The court found several deficiencies in both of the experts' testimony with respect to discrimination in delivery both as to the number of trucks allocated and the timing of deliveries.[18] The court was concerned that the appellant's

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[18] The court stated:

> On this point [discrimination] both the evidence of the Plaintiff and the evidence of the Defendant were, I think—was considerably deficient . . . .

expert chose to select comparative dealers based on whether the expert thought they received "favored treatment" and that the expert had selected a dealer that was not in the same region as P.O.F.[19]

The court also pointed out that the raw figures indicated that P.O.F. received trucks faster than other dealers. The court concluded that when the appellant's expert added computations there was a difference in delivery that was so insignificant that it became unimportant.

On the interference with a prospective business relationship claim, the court found that if the property had been sold to Doonan, the profits generated would have been insufficient to pay the debts owed and that there would not have been any money left to place in the business. The court felt it was a distortion of the evidence to advance a contrary contention.

After reviewing the thrust of the district court's order, it is obvious that the new trial was not ordered solely because the jury verdict was against the clear weight of the evidence. This is a case where a combination of factors, which could

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> It was never shown by either side on this discrimination point of how many trucks were being produced and how many actually were available to come to Peterbilt of Florida and whether Peterbilt Motor Company was deliberately allocating 125 trucks when they could have allocated 250, for example. The Plaintiff didn't show that and the Defendant didn't show that.

Record Vol. 17 at 41-42.

The court also criticized PACCAR's expert based on his past connections with PACCAR. Apparently, some of the divisions of PACCAR, such as Peterbilt, were major customers of the expert witness and provided the witness with a substantial amount of income.

[19] On the method of selecting comparative dealers, the court concluded:

> Of all of the numerous dealers instead of picking them at random he just picked four that he suspected got favor [sic] treatment which might show that those four got favor [sic] treatment but by comparing Peterbilt of Florida to them would not necessarily come up with the—could not come up with the conclusion that Peterbilt of Florida was discriminated against as to the average dealer but only that it was discriminated against as to a favored dealer. One of these dealers was not in the southeast section.

Record Vol. 17 at 41.

have caused the jury to reach a possible erroneous verdict, led the court to conclude that a new trial was necessary. Under these circumstances, the district court was allowed wide discretion in granting the new trial. *See O'Neil v. W.R. Grace & Co.,* 410 F.2d 908, 914 (5th Cir.1969).

III. THE JURY INSTRUCTIONS UNDER THE FLORIDA ACT

We now address the district court's failure to instruct the jury on the burden of proof under the Florida Act in accordance with *International Harvester Company v. Calvin,* 353 So.2d 144 (Fla.Dist.Ct.App.1977). We have recently had the opportunity to examine the Florida Act in *Dick Winning Chrysler v. Chrysler Motors Corporation,* 750 F.2d 895 (11th Cir.1985). In *Dick Winning* we discussed *International Harvester:*

> In *International Harvester Co.,* a truck dealer protested a manufacturer's cancellation of its franchise agreement. On review, the Florida appellate court held that the dealer had the initial burden of establishing that the manufacturer's decision to terminate the franchise agreement was unfair. The court further stated that the burden, following a prima facie showing of bad faith, shifts to the manufacturer, to show by a preponderance of the evidence that it would have reached the same decision in the absence of the alleged bad faith. *International Harvester Co.,* 353 So.2d at 148 (citing *Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274, 286, 97 S.Ct. 568 [575], 50 L.Ed.2d 471 (1977)).
>
> After evaluating the substantial uncontroverted objective data produced by the parties, the *International Harvester* court concluded that any prima facie showing of unfairness by the dealer, Rich Motors, was clearly rebutted by the objective data submitted by the manufacturer. The court concluded

> that International Harvester's decision to terminate Rich Motors was in accordance with the parties' franchise agreement. Likewise, we find that Chrysler Motors' decision to terminate Winning Chrysler was in accordance with the parties' franchise agreement, and Winning Chrysler has failed to prove that Chrysler Motors imposed any "unfairness" upon the dealership.

Id. at 898-99. An examination of the district court's instruction regarding the Florida Act demonstrates that the jury was not instructed on PACCAR's burden of proof as set forth in *International Harvester. See Record* Vol. 29 at 2770-76. Thus, there is no assurance that the jury applied the appropriate burden of proof. Because PACCAR did not admit the appellant's prima facie case and thus assume the burden of proof, it was entitled to have the jury charged on this critical aspect of its case.

"The question on appeal is not whether an instruction was faultless in every respect, but whether the jury, considering the instruction as a whole was misled . . . . Thus, only in those cases where the reviewing court has a substantial doubt whether the jury was fairly guided in its deliberations should the judgment be disturbed." *Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Company,* 615 F.2d 1372, 1390 n. 16 (5th Cir.1980), *cert. denied* 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980) (citations omitted).

The appellants essentially argue that the falure to instruct on the burden of proof was harmless.[20] We disgree. The failure to instruct on PACCAR's burden of proof was too central to be harmless. To hold otherwise "would be to

[20] The appellants urge that the failure to instruct was favorable to PACCAR "given the instruction at the beginning of trial that PACCAR could not be liable if it had 'just cause' for 'failing to renew or refusing to renew' POF's contract . . . [and] the general instruction on burden of proof . . . ." *Appellant's Reply Brief* at 23-24. It is further contended that the charge did not mislead the jury and that the jury understood the issues it was to apply in arriving at its decision.

abrogate the district court's duty to instruct the jury accurately." *Id.* at 1391 n. 16.

We have ordered a new trial where "the charge given on burden of proof was in error and was prejudicial to the appellant." *Phillips v. State Farm Mutual Automobile Insurance Company,* 437 F.2d 365, 368 (5th Cir.1971). In this case, the failure to instruct the jury on the burden of proof was prejudicial. Moreover, we have substantial doubts that the jury was completely guided during its deliberations. Thus, we hold that the district court did not abuse its discretion when it granted a new trial due to its failure to instruct the jury on the burden of proof under the Florida Act as set forth in *International Harvester.*

IV. THE FEDERAL DEALERS' DAY IN COURT ACT

Our independent examination of the record has led us to conclude that the evidence before the jury on the discrimination issue was deficient. One obvious problem with the evidence was the failure of the appellants' expert to present sufficient facts demonstrating that the dealers, with whom P.O.F.'s deliveries were compared, were similar to P.O.F.

The appellants' expert selected dealers whom the expert thought received "favored treatment" and failed to restrict his selection to dealers located in the southeastern region.[21] In addition, the expert examined some of the more profitable Peterbilt dealers.[22]

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[21] PACCAR's expert stated that the southeast region consisted of Alabama, Georgia, Florida, Mississippi, Kentucky, South Carolina, North Carolina, West Virginia, and Virginia. The appellants' expert stated that he examined the southeast region as defined by Peterbilt. However, it is undisputed that one of the dealers was located in Massachusetts. *Record,* Vol. 25 at 1594.

[22] A cursory examination of the 1977 dealer rankings with respect to the sales of parts and trucks illustrates that the dealers selected may not have been sufficiently comparable. Comparative dealers are underlined on the ranking charts which are reprinted below.

Although evidence of another dealer's performance is admissible and helpful in these cases, we cannot hold that a litigant can select a dealer without regard to the dealer's geographic location, size, product mix, and market potential merely because the dealer is suspected of receiving "favored treatment."[23] *See Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation in U.S.A.*, 533 F.2d 510, 512 (10th Cir.1976) (dealer who contended that it had been discriminated against by the distribution and allocation of automobiles selected comparative dealers that were geographically close); *cf. Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814, 821 n. 8 (1st Cir.1983), *cert. denied* ___ *U.S.* ___, *104 S.Ct. 241, 78 L.Ed2d 231 (1983)* (In response to an argument that there was no showing that the dealerships were sufficiently similar for the comparison to be legitimate, the court noted that it was not

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Southeast Region
Performance Review

Trucks		Parts	
1. Peterbilt of Knoxville	399%	1. Trucks, Inc.	132%
2. Ed Wright	200%	2. Peterbilt of Nashville	129%
3. Easom Truck Sales	175%	3. Peterbilt Southern	119%
4. Nalley Motor Trucks	149%	4. Peterbilt of Knoxville	116%
5 Peterbilt of Louisiana	129%	5. Nalley	111%
5. Peterbilt of Nashville	129%	6. Easom	102%
6. Trucks, Inc.	116%	7. Peterbilt of Louisiana	97%
7. Peterbilt Southern	115%	8. Ed Wright Trucks	90%
8. Peterbilt of Mississippi	114%	9. Peterbilt of Florida	73%
9. Peterbilt of Florida	106%	10. Dunham GMC	70%
10. Dunham GMC	89%	11. Dickerson GMC	50%
11. Tri-State	82%	12. Peterbilt of Mississippi	43%
12. Fitzgerald	73%	13. Key GMC—Mobile	39%
13. Dickerson GMC	32%	14. Fitzgerald	37%
14. West Virginia Trucks	13%	15. Tri-State	20%
REGION TOTAL	158%	16. West Virginia Trucks	19%
		REGION TOTAL	93%

Plaintiff's Exhibit 314 (emphasis added).

[23] By no means do we hold that all of these factors must be proven before a dealer can be found to be comparable. However, objective factors should be utilized when an expert selects comparative dealers. The factors mentioned help assure that objective measures are present during the selection process.

specifically contended "that the dealerships were geographically so distant as to make them incomparable, a possibility not necessarily apparent."); *Farmington Dowel Products v. Forster Mfg. Co., Inc.,* 421 F.2d 61, 82 n. 48 (1st Cir.1970) (District court in antitrust case correctly concluded that two businesses were not sufficiently comparable based on an examination of the products manufactured, sales and distribution system, capitalization, sales and profits, and customer groups.).

We are unable to conclude that the appellants compared P.O.F. to similar dealers. However, there are other factors that support the district court's award of a new trial. Our review of the record demonstrates that the evidence regarding the method of allocating trucks to dealers, the causes of the allocation system, and the effect strikes and similar production delays had on the system was sparse. Although some of these factors were briefly discussed by witnesses, the jury could not have had a clear understanding of how the normal allocation system operated. As a result, the jury could not determine whether Peterbilt purposely deviated from its normal allocation system when it allocated trucks to P.O.F.

One court has established a three-part test for determining whether a manufacturer has failed to make products available to a dealer. First, the plaintiff must prove that it actually ordered more vehicles than it received.[24] Second, it must be shown "that the particular model vehicles ordered, but not supplied, were available for delivery, *i.e.,* there was no product shortage at the time, or if there existed a period of product shortage such as was customary in the business during the months of new model introduction . . . that [the manufacturer] failed to allocate vehicles in a fair and reasonable manner." *Cecil Corley Motor Company v. General Motors Corporation,* 380 F.Supp. 819, 835 (M.D.Tenn.1974).

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[24] The fact that P.O.F. did not receive all of the trucks ordered is clear from the record.

Third, it must be demonstrated that the manufacturer failed to make such vehicles available for the reasonable requirements of the dealer's area of sales responsibility. *Id.*

It is the second factor of the well reasoned test set forth in *Cecil Corley* that has not been developed in this case. The absence of this critical evidence made it impossible for the jury to accurately determine whether Peterbilt had acted in bad faith when it failed to supply P.O.F. with the trucks it ordered.

As the district court properly pointed out, the fact that P.O.F. failed to obtain financing, which was a valid contractual requirement, is undisputed. The only evidence regarding discrimination was that presented by both of the experts. If the experts' evidence were omitted, the remaining evidence that Peterbilt had begun to establish a file on P.O.F. in order to amicably terminate P.O.F. would be insufficient to demonstrate a lack of good faith. As stated in *Woodward v. General Motors Corporation,* 298 F.2d 121 (5th Cir.1962), the federal act does not "'curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.'" *Id.* at 128. Moreover, we have recently held that a dealer was properly terminated for failure to abide by the terms of its franchise agreement. *See Dick Winning Chrylser v. Chrylser Motors Corporation,* 750 F.2d 895, 899 (11th Cir.1985).

V. CONCLUSION

The district court did not abuse its discretion in granting a new trial. We have tried faithfully to review the facts and the law in reaching this conclusion. Plaintiffs' suit was based essentially on the Florida and Federal Dealer Acts, which require good faith on the part of a motor vehicle manufacturer in terminating or not renewing a dealership contract. In this case PACCAR did not renew basically because P.O.F. could not provide floor plan financing. P.O.F. attempted to show that it lost its financing because of PACCAR's bad faith

dealings. P.O.F.'s evidence was speculative, both substantively and as to causation. While P.O.F. increased its sales considerably in the early '70's, it was never sufficiently capitalized according to P.O.F.'s own accountant. P.O.F.'s expert described the 1975-76 recession as particularly severe in Florida in regard to the sale of trucks. P.O.F.'s troubles began at that time. The district court's assessment of the evidence was correct when it held that the evidence that PACCAR discriminated against P.O.F. was inherently speculative, and that P.O.F.'s financial difficulties could not be attributed to this speculative discrimination.

The appellant was entitled to a new trial but waived that right to obtain an immediate review of the jury's verdict. Since we hold that the appellant was not entitled to a judgment on the jury verdict, the district court was correct in entering a judgment notwithstanding the verdict even though the court initially denied the defendant's motion. The judgment notwithstanding the verdict is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT
OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs.

PACCAR,INC.,
a Delaware corporation,

Defendant.

No. 79-598-Orl-Civ-Y

ORDER

On December 23, 1983 this Court entered an order denying defendant's motion for judgment notwithstanding the verdict and granting defendant's alternative motion for a new trial. Pursuant to Rule 60(b), plaintiffs now move the Court to enter a judgment notwithstanding the verdict in order to permit an immediate appeal. At the hearing on this latest motion defendant's counsel represented that the defendant would not object to a motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

FILED
ORLANDO, FLA.
FEB. 24, 1983
CLERK
U.S. DISTRICT COURT

M'FILM ROLL #42
DOCUMENT #1473

In support of this rather unusual procedure, plaintiffs rely on *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171 (6th Cir. 1981). In *National Polymer Products, supra,* the Court found the jury verdict for the plaintiff to be against the clear weight of the evidence and granted defendant's motion for new trial. Plaintiff filed a motion under Rule 60 to "correct" the Court's order by entering a judgment notwithstanding the verdict for the defendant. The Court granted the motion for judgment notwithstanding the verdict in favor of the defendant and dismissed the case. On appeal to the Sixth Circuit Court of Appeal, defendant argued that that court was without jurisdiction to entertain the appeal because the plaintiff "consented" to the entry of judgment notwithstanding the verdict. The Court in that case held:

> "The dismissal, though perhaps indirectly and in a very loose sense solicited by National Polymer was not voluntary . . ." 660 F.2d at 177.

Although the Circuit Court found the District Court erred on the merits in dismissing the case, the procedure was approved.

The present posture of the proceedings at bar places this Court in an unusual position: both sides ask for a judgment notwithstanding the verdict but, of course, for different reasons. Furthermore, plaintiffs concede they are in favor of a judgment notwithstanding the verdict solely for the purpose of being able to contest such judgment without the necessity of having a new trial at this time.

In *National Polymer Products, supra,* the Sixth Circuit Court of Appeals relied on *Thomsen v. Cayser,* 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed.2d 597 (1917), for approving the procedure noted above. In *Thomsen v. Cayser, supra,* the Circuit Court of Appeals for the Second Circuit had determined in that antitrust case that it would be impossible to hold that the record disclosed a combination in unreasonable restraint of trade but that it would be unduly prejudicial to plaintiffs to reverse the judgment with

instructions to dismiss and that upon another trial the plaintiffs might be able to produce additional testimony tending to make out a case and accordingly, the Court of Appeals remanded the case to the trial court for a new trial. However, the plaintiffs had a rehearing, waived any right to a new trial and consented that the case should be disposed of one way or the other. As a result of the rehearing, the Court of Appeals recalled its mandate and reversed the judgment with instructions to enter an order dismissing the complaint. On appeal to the Supreme Court of the United States, that Court held:

> "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory so that they might come to this court without further delay."[1]

243 U.S. at 83, 37 S.Ct. at 358, 61 L.Ed. at 605.

Adopting the reasoning of *Thomsen v. Cayser, supra,* and *National Polymer Products, supra,* this Court will grant the motion for judgment notwithstanding the verdict and grant defendant's alternative motion for a new trial. Accordingly it is

ORDERED that the motion for judgment for the defendant notwithstanding the verdict be and is hereby granted and this case is dismissed with prejudice, and it is further

ORDERED that in the alternative the motion for new trial be and is hereby granted in the event the judgment notwithstanding the verdict be vacated or reversed.

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[1]The Supreme Court proceeded to adjudicate the case on its merits.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of February, 1983.

s/George C. Young

Senior United States District Judge

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT
OF FLORIDA, INC., a Florida corp.,

Plaintiffs,

vs.

PACCAR, INC, a Delaware corporation,

Defendant.

FILED
ORLANDO, FLA.
DEC 23 1982
CLERK
U.S. DISTRICT COURT

Case No. 79-598-Orl-Civ-Y

ORDER

This cause came on for hearing on December 3, 1982 on defendant's motion for judgment notwithstanding verdict or alternative motion for new trial. For the reasons stated from the bench at the conclusion of the aforesaid hearing the motion for judgment notwithstanding verdict should be denied, but the alternative motion for new trial should be granted. It is this Court's opinion that the admission of Dr. Westbrook's testimony (the expert who testified on behalf of plaintiff) as support for both liability and damages was in error in that it was completely speculative. Without such evidence the plaintiff could not have prevailed. Accordingly, it is

ORDERED that the motion for judgment notwithstanding verdict be and is hereby DENIED; and it is further

ORDERED that the alternative motion for new trial be and is hereby GRANTED.

SO ORDERED in Chambers at Orlando, Florida, this 23rd day of December, 1982.

s/George C. Young

SENIOR UNITED STATES DISTRICT JUDGE

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CIV 31
(7/63)

JUDGMENT ON JURY VERDICT

United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA -
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT
OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs.

JUDGMENT
M'FILM #40
DOCUMENT #1953

PACCAR INC.,
a Delaware corporation,

Defendant.

Civil Action File No. 79-598-Orl-Civ-Y

JUDGMENT

This action came on for trial before the Court and a jury, Honorable George C. Young Senior, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, James E. Deas, recover of the defendant, PACCAR INC., the sum of

ONE HUNDRED SEVENTY FIVE THOUSAND SIX HUNDRED EIGHTY TWO DOLLARS, ($175,682.00) plus cost to bear interest at a rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment, which is 10.41% per annum.

It Is Further Ordered and Adjudged that the plaintiff, PETERBILT OF FLORIDA, INC., a Florida corporation recover of the defendant, PACCAR INC., the sum of TWO MILLION FORTY THOUSAND EIGHT HUNDRED SEVEN DOLLARS, ($2,040,807.00) plus costs to bear interest at a rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment, which is 10.41% per annum.

FORM OF JUDGMENT
APPROVED FOR ENTRY

s/George C. Young
SENIOR UNITED STATES DISTRICT JUDGE

Dated at Orlando, Florida, this 22nd day of October, 1982.

DONALD M. CINNAMOND
Clerk of Court

By s/Donald H. Brown
Deputy Clerk

I certify the foregoing to be a true
and correct copy of the original.
DONALD M. CINNAMOND, Clerk
United States District Court
Middle District of Florida

By s/Donald H. Brown
Deputy Clerk

FILED
ORLANDO, FLA.
OCT 22 1982
CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES E. DEAS and PETERBILT
OF FLORIDA, INC., a Florida corporation,

Plaintiffs,

vs.

PACCAR INC.,
a Delaware corporation,

Defendant.

No. 79-598-Orl-Civ-Y

SPECIAL INTERROGATORY VERDICT

1. Has the plaintiff Peterbilt of Florida, Inc. proved by a preponderance of the evidence that the defendant Paccar, Inc. has violated the Florida Automobile Dealers Day In Court Act as alleged?
   Answer "yes" or "no". Yes

If your unanimous answer to Interrogatory #1 above is "no", then do not consider Interrogatory #2 but proceed to consider Interrogatory #3. On the other hand, if your unanimous answer to Interrogatory #1 above is "yes", then proceed to consider and answer Interrogatory #2.

2. What is the dollar amount of damage, if any, that the plaintiff Peterbilt of Florida, Inc. has proved by the preponderance of the evidence that it sustained as a

proximate result of the defendant's violation of the Florida Automobile Dealers Day In Court Act reduced to its present money value?

680,269

3 . Has the plaintiff Peterbilt of Florida, Inc. proved by a preponderance of the evidence that the defendant Paccar, Inc. has violated the Federal Automobile Dealers Day In Court Act as alleged?
Answer "yes" or "no".

Yes

If your unanimous answer to Interrogatory #3 above is "no", then do not consider Interrogatory #4 but proceed to consider Interrogatory #5. On the other hand, if your unanimous answer to Interrogatory #3 above is "yes", then proceed to consider and answer Interrogatory #4.

4. What is the dollar amount of damage, if any, that the plaintiff Peterbilt of Florida, Inc. has proved by the preponderance of the evidence that it sustained as a proximate result of the defendant's violation of the Federal Automobile Dealers Day In Court Act reduced to its present money value?

680,269

5. Has the plaintiff James E. Deas proved by a preponderance of the evidence that Paccar, Inc. intentionally interfered with a prospective business relationship between him and Doonan Truck & Equipment, Inc.?
Answer "yes" or "no".

Yes

If your unanimous answer to Interrogatory #5 above was "no", then do not consider any of the following interrogatories but proceed to return your verdict. On the

other hand, if your unanimous answer to Interrogatory #5 above was "yes", then proceed to consider and answer Interrogatory #6.

6. Has the defendant Paccar, Inc. proved by a preponderance of the evidence that it interfered with the prospective business relationship between plaintiff James E. Deas and Doonan Truck & Equipment, Inc. because it had a justifiable business interest for interfering with such prospective business relationship and that such interference was for the purpose of protecting such interest and was not accomplished by improper means?
Answer "yes" or "no". No

If your unanimous answer to Interrogatory #6 above was "yes", then you need not consider Interrogatory #7 and should proceed to return your verdict. On the other hand, if your unanimous answer to Interrogatory #6 above was "no", then you should proceed to consider and answer Interrogatory #7 below.

7. What is the dollar amount, if any, including interest, if any, of damage that the plaintiff James E. Deas has proved by a preponderance of the evidence that he sustained as a proximate result of the defendant's intentional interference with the negotiations between him and Doonan Truck & Equipment, Inc. reduced to its present money value? 175,682

SO SAY WE ALL.

s/Joseph Scribner Pierce
Foreman

JSP

22th

DATED this ~~21th~~ day of October, 1982.

FILED
IN OPEN COURT
OCT 22 1982
CLERK
U.S. DISTRICT COURT